



# THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### **Joined Cases T-125/03 and 253/03, AKZO Nobel and Ackros Chemicals Ltd v Commission**

**Citation for published version:**

Andreangeli, A 2008, 'Joined Cases T-125/03 and 253/03, *AKZO Nobel and Ackros Chemicals Ltd v Commission*', *European Business Law Review*, vol. 19, no. 6, pp. 1141-61.  
<<http://www.kluwerlawonline.com/abstract.php?area=Journals&id=EULR2008053>>

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Peer reviewed version

**Published In:**

European Business Law Review

**Publisher Rights Statement:**

© Andreangeli, A. (2008). Joined Cases T-125/03 and 253/03, AKZO Nobel and Ackros Chemicals Ltd v Commission. *European Business Law Review*, 19, 1141-61.

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



**Joined cases T-125/03 and 253/03, AKZO Noble Chemicals Ltd v Ackros Chemicals Ltd v Commission, judgment of 17 September 2007, not yet reported (under appeal)**

**Dr Arianna Andreangeli, Lecturer in Law  
Liverpool Law School, University of Liverpool\***

## **1. Introduction**

The definition of the scope of legal professional privilege (hereinafter referred to also as LPP) in EC law has long been debated.<sup>1</sup> The ECJ was criticised for adopting a restrictive notion of the privilege, limited only to communications emanating from independent counsel, namely, a legal adviser who is not linked to his or her client by a relationship of employment.<sup>2</sup> Therefore, repeated calls have been made in favour of the extension of this safeguard to correspondence originated from in-house lawyers.<sup>3</sup> The enactment of the Modernisation Regulation (hereinafter referred to also as Regulation No 1/2003)<sup>4</sup> has added momentum to this debate, due to the emphasis placed by the Regulation on the close cooperation between the Commission and the National Competition Authorities (hereinafter referred to also as NCAs), including the power to exchange and use as evidence information gathered

---

\* Heartfelt thanks are owed to Prof Fiona Beveridge, of the University of Liverpool, for her feedback on an earlier draft of this paper. The author is the sole responsible for any errors or omissions.

<sup>1</sup> See, e.g., FENNELLY, “Lawyers and employed lawyers: the Application of Legal Professional privilege”, (1998) 1 *Irish Bus. L.* 2; CARR, “Should in-house lawyers have lawyer-client privilege?”, (1996) 24 *Int’l Business Lawyer* 522; FAULL, “In-house lawyers and legal professional privilege: a problem revisited”, (1998) 4 *Colum. J. of Eur. L.* 139; HILL, “A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community”, (1995) 27 *Case W. Res. J. of Int’l L.* 145; CHRISTOFOROU, “Protection of legal privilege in EEC competition law: the imperfections of a case”, (1985-86) 9 *Fordham Int L J* 1. More recently, see GIPPINI FOURNIER, “Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance”, (2005) 28 *Fordham Int’l L J* 967; VESTERDORF, “Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues”, in HAWK (Ed.), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute*, 2005: New York, Juris Publishing, p. 701.

<sup>2</sup> Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575.

<sup>3</sup> See, e.g., JOSHUA, “Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?”, (2004) 7 *Global Comp. Rev.* 39; POWER, “Representing clients after the Modernisation of EC Competition law”, (2003) 14 *ICCLR* 335; LAMBERT, “Parallel Antitrust investigations: the long arm of the DOJ from the perspective of an EU defence counsel”, (2002) 14 *Loy. Consumer L. Rev.* 509.

<sup>4</sup> Council Regulation No 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

during competition proceedings,<sup>5</sup> and to the conferral to the Commission itself of wider powers of investigation.<sup>6</sup>

Against this background, although the interim order in the case of *AKZO Nobel and Ackros Chemicals v Commission*<sup>7</sup> had been saluted as potentially paving the way for a reformulation of the privilege on the basis of the allegiance to rules of professional conduct enforced by independent organisations in the public interest,<sup>8</sup> the CFI judgment handed down in September 2007<sup>9</sup> reaffirmed the existing position, as enshrined in the ECJ *A.M. & S. v Commission*<sup>10</sup> decision.

This case note will examine the judgment of the CFI in *AKZO Nobel and Ackros Chemicals v Commission*. After a brief outline of the proceedings and especially of the 2004 interim order, it will show that, by affirming the right of the investigated undertakings to challenge the decision of the Commission rejecting their claim for privilege before the Community Courts,<sup>11</sup> the CFI sought to ensure that appropriate safeguards be in place to avoid disclosure of privileged communications through the continuous judicial supervision over the Commission's investigative measures.

The case note will also illustrate the wider implications of the judgment for the role and function of the legal profession in EC law. It will be argued that, by reaffirming the concept of privilege enshrined in the *A.M. & S.* judgment, the CFI adhered to the view that, to fulfil his or her function of providing legal advice in the interest of the sound administration of justice, a lawyer would not only have to be authorised to practise in one of the Member States and thus bound to observe rules of professional ethics applied in the public interest, but must also be free from any relationship of employment, and thus of economic dependence, with his or her client.

---

<sup>5</sup> Article 12, Council Regulation No 1/2003.

<sup>6</sup> See, *inter alia*, VESTERDORF, "Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues", in HAWK (Ed.), *International Antitrust Law and Policy: Annual Proceedings of the Fordham Corporate Law Institute*, 2005: New York, Juris Publishing, p. 701; ANDERANGELI, "The impact of the Modernisation regulation on the guarantees of due process in competition proceedings", (2006) 31 (3) *ELRev* 342.

<sup>7</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771.

<sup>8</sup> *Id.*, para. 126.

<sup>9</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported. For commentary, see, *inter alia*, Case comment, (2008) 12(1) *Int'l J. of Ev. & Proof* 72; MYKOLAITS, "Developments of legal professional privilege under AKZO/Ackros judgment", (2008) 14(1) *Int'l J. of Trade & R.* 1.

<sup>10</sup> Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575.

<sup>11</sup> See *id.*, para. 46-48.

However, it will be questioned whether accepting this “negative” concept of independence, as opposed to a “positive” one, based on the allegiance to positive ethical standards,<sup>12</sup> is still consistent with the needs of the framework for the enforcement of the EC competition rules. It will be shown that the forthcoming appeal judgment of the ECJ<sup>13</sup> constitutes a turning point, since it is going to clarify the requirements of LPP in Community law and overall, how to balance the apparently conflicting interests in, respectively, the effective enforcement of Articles 81 and 82 EC Treaty and in the protection of the rights of defence of the undertakings concerned, of which LPP is an essential part.

## **2. Background: the 2004 interim order**

As is well known,<sup>14</sup> the *AKZO Nobel* litigation<sup>15</sup> originated from the seizure by Commission officials, in the course of an investigation ordered in accordance with Article 14 of Regulation 17/62, of two sets of documents which the investigated parties claimed were covered by LPP. One set of documents, referred to as “Set A”, was represented by a memorandum recording internal discussions between the general counsel of Ackros Chemicals and other employees of the company and addressed to a member of the senior management. The applicant claimed that the records had been made for the purpose of seeking legal advice from independent counsel in relation to the existing compliance programme.

“Set B”, instead, was made up of a number of preparatory handwritten notes taken by the company’s general manager, used as a “background” to set A, as well as of a number of emails between AKZO’s general manager and the company’s “competition law coordinator”, who was a Dutch *advocaat*, that is, an in-house attorney authorised to practise as a member of the Netherlands Bar. After hearing the parties’ representations, the officials concluded that they could not reach a definitive decision on the nature of the set A documents and,

---

<sup>12</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 167-168.

<sup>13</sup> Case 550/07 P: Appeal brought on 8 December 2007 by AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd against the judgment of the Court of First Instance (First Chamber) delivered on 17 September 2007 in Case T-253/03: *Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd v the Commission of the European Communities*, [2008] OJ C37/19.

<sup>14</sup> For an account of the facts of the case and of the interim order, see, *inter alia*, MURPHY, “CFI signals possible extension of professional privilege to in-house lawyers”, (2004) 25(7) *ECLR* 447.

<sup>15</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771, para. 6-7.

accordingly, placed their copies in a sealed envelope.<sup>16</sup> In respect of Set B, namely the memorandum recording conversations with lower level employees and the emails, the officials were in no doubt that they could not benefit from privilege; consequently, they were copied and placed on the file.<sup>17</sup>

The applicants impugned the final decision rejecting the claim for privilege<sup>18</sup> and also sought the suspension of the operation of the decisions ordering the inspections and sought to oblige the Commission to place both sets of documents in a sealed envelope pending the resolution of the dispute.<sup>19</sup>

The President of the CFI recalled<sup>20</sup> that, in accordance with the ECJ decision in *A.M. & S.*,<sup>21</sup> the powers conferred on the Commission by Regulation 17 were not unlimited, but should be interpreted as safeguarding the secrecy of the communications between a lawyer and his or her client, providing such communications are made “for the purposes and in the interest of the client’s rights of defence and (...) emanate from independent lawyers, i.e. lawyers who are not bound to the client by a relationship of employment.”<sup>22</sup>

The protection of lawyer-client confidentiality was strictly related to the need to safeguard, in the context of competition enforcement by the Commission, the rights of the defence enjoyed by the investigated undertakings, of which it constituted an essential corollary.<sup>23</sup> That secrecy was, in the light of *A.M. & S.*,<sup>24</sup> “intimately linked to the conception of the lawyer’s role as collaborating in the administration of justice by the courts” and was aimed at allowing the provision of legal advice to the client “in full independence and in the overriding interest of that cause (...).”<sup>25</sup>

The interim order acknowledged that in this context “it may prove necessary (...) for the client to prepare working or summary documents” detailing factual information, often of a complex nature, required for the purpose of enabling counsel to provide legal advice in full knowledge of the

---

<sup>16</sup> *Id.*, para. 8.

<sup>17</sup> *Id.*, para. 10-11.

<sup>18</sup> *Id.*, para. 14.

<sup>19</sup> *Id.*, para. 32.

<sup>20</sup> *Id.*, para. 95.

<sup>21</sup> Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575.

<sup>22</sup> *Id.*, para. 21.

<sup>23</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771, para. 99-100.

<sup>24</sup> See case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575, para. 24.

<sup>25</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771, para. 101.

factual circumstances and the context of the case.<sup>26</sup> Therefore, it was held that the rights of defence enjoyed by the investigated parties would be *prima facie* irremediably impaired if the Commission could seize copies of documents prepared by the investigated parties solely for the purpose of exercising their rights of the defence by seeking advice from their lawyer.<sup>27</sup> It was thus concluded that in principle, this type of evidence could benefit from LPP.<sup>28</sup>

In relation to the disclosure of the set A documents, namely the “typewritten memoranda (...) drafted in the context of a competition law compliance” for the purpose of seeking advice from independent counsel,<sup>29</sup> the President of the CFI recognised that the mere existence of a compliance programme created by an independent counsel was not sufficient to prove that any document prepared in its context would be privileged.<sup>30</sup>

However, he stated that, in view of their purpose, content and scope, it could not in principle be excluded that they may be privileged.<sup>31</sup> In fact, they had been prepared exclusively to obtain legal advice from an independent lawyer, concerned relevant matters of competition law<sup>32</sup> and especially facts that justified the need to consult a legal adviser for the purpose of preparing a framework for the exercise of the client’s rights of the defence.<sup>33</sup>

With respect to set B, major problems arose in respect of the emails exchanged between Ackros’s General Manager and AKZO Nobel’s in-house counsel. Although the President acknowledged that, since the legal adviser was in a relationship of permanent employed, the communications emanating from him were not in principle privileged,<sup>34</sup> he also pointed out that the concept of privilege emerging from the *A.M. & S.* case was based on “the interpretation of the principles common to the Member States dating from 1982”.<sup>35</sup>

The order acknowledged that these principles had evolved, at least in some of the Member States, in the sense of extending the protection of confidentiality to written communications emanating from employed legal

---

<sup>26</sup> *Id.*, para. 102.

<sup>27</sup> *Id.*, para. 104.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, para. 106.

<sup>30</sup> *Id.*, para. 106-107.

<sup>31</sup> *Id.*, para. 109.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Id.*, para. 113. See also, *mutatis mutandis*, case T-30/89, *Hilti AG v Commission* (interim order), [1990] ECR II-163, para. 17-18.

<sup>34</sup> Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771, para. 119.

<sup>35</sup> *Id.*, para. 122.

advisers, provided that they were subject to the observance of rules of professional conduct.<sup>36</sup>

As a result, it was held that, even though it was indispensable to avoid the situation where the extension of the cover of privilege could result in “abuses which would enable evidence of an infringement of the Treaty competition rules to be concealed”,<sup>37</sup> the applicants had provided the Court with a *prima facie* case that the role of independent lawyers as auxiliaries to the courts in the administration of justice could also be exercised by employed lawyers who were also subject to “strict rules of professional conduct.”<sup>38</sup>

In the case at hand, the lawyer was a “a member of the Netherlands Bar, subject to professional obligations as regards independence and respect for the rules of the Bar comparable to those of an external lawyer”.<sup>39</sup> Accordingly, it was concluded that there could not be any presumption that the existence of a relationship of employment with the client could adversely affect the independence necessary for the fulfilment of the lawyer’s function in the context of the administration of justice, providing he or she be bound to strict professional standards commensurate to his or her status.<sup>40</sup>

The interim order also found that the applicants had disclosed a *prima facie* case<sup>41</sup> that the procedure employed by the Commission officials to assess the nature of the communications might be incompatible with the protection of the rights of defence enjoyed by the investigated parties.<sup>42</sup> The President of the CFI took the view that when an allegation of privilege was made, the party concerned would not be obliged to disclose the document in dispute, but must only provide the Commission with “relevant material” capable of substantiating that claim.<sup>43</sup> If the Commission, however, was minded to reject that claim, it could not examine the document without first having given the investigated undertaking the opportunity to challenge its decision before the CFI.<sup>44</sup>

Accordingly, and unless the investigated parties had granted consent to disclose the evidence, the Commission officials could not cast that “cursory glance” and would have no other alternative but to place the document in a

---

<sup>36</sup> *Id.*, para. 124.

<sup>37</sup> *Id.*, para. 121.

<sup>38</sup> *Id.*, para. 125.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Id.*, para. 126.

<sup>41</sup> *Id.*, para. 143, 146-148.

<sup>42</sup> *Id.*, paras. 132 ff.

<sup>43</sup> *Id.*, para. 132-133.

<sup>44</sup> *Id.*, para. 134.

sealed envelope to avoid a breach of confidentiality.<sup>45</sup> Although the order in *AKZO Nobel* may have appeared a “modest procedural victory for the applicants”<sup>46</sup> its potential for a future redefinition of legal professional privilege could not be overlooked. The reasoning of President Vesterdorf seemed to support the view that the scope of professional privilege should be defined solely on the basis of the allegiance of the lawyer to binding rules of ethics.<sup>47</sup>

However, the ECJ annulled the CFI’s interim order on the grounds of lack of urgency. The Court opined that the “mere reading” of the communication in question “without that information being used” as evidence,<sup>48</sup> despite being in principle “capable of affecting professional privilege”,<sup>49</sup> was not “sufficient to establish the existence of serious and irreparable harm”<sup>50</sup> only because the Commission officials had already “cast their cursory glance” over the documents.<sup>51</sup> Nonetheless, the ECJ order left open the question whether the possibility for the investigating officials to examine, even cursorily, documents whose privileged nature is alleged, is consistent with the effective protection of lawyer-client confidentiality.<sup>52</sup>

In the light of the above analysis, the final judgment was widely awaited, since it would have provided the CFI’s “definitive word” on whether the Community notion of LPP should be extended to include communications originating from employed counsel and on the procedure that the Commission should follow to assess the nature of allegedly privileged evidence. The CFI decision will be analysed in the next section.

### **3. The *AKZO Nobel* and *Ackros* judgment**

The previous section illustrated how the *AKZO Nobel* interim order fostered the expectation that the CFI would reformulate the *A.M. & S.* test for legal

---

<sup>45</sup> *Id.*, para. 139-140.

<sup>46</sup> MURPHY, “CFI signals possible extension of professional privilege to in-house lawyers”, (2004) 25 *ECLR* 447 at 453.

<sup>47</sup> HILL, “A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community”, (1995) 27 *Case W. Res. J. of Int’l L.* 145 at 191.

<sup>48</sup> Case C-7/04 P (R), *Commission v AKZO Nobel and Ackros Chemicals*, [2004] ECR I-8739, para. 43.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.* For commentary, see GIPPINI FOURNIER, “Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance”, (2005) 28 *Fordham Int’l L J* 967, p. 1023-1025.

<sup>52</sup> *Inter alia*, DEKEYSER and GAUER, “The new enforcement system for articles 81 and 82 and the rights of the defence”, in HAWK (Ed.), *International Antitrust Law and Policy*, 2005: New York, Juris Publishing, p. 549 at 572.



professional privilege so as to take into account the changes evident in the laws of some Member States in respect to the position of in-house counsel. However, the CFI preferred to reiterate the existing test. It confirmed that the *A.M. & S.* concept of privilege<sup>53</sup> was consistent with a requirement of “negative independence” of counsel, focused on the absence of links with his or her client and not with a “positive” idea of autonomy, based on “membership of a Bar or Law Society”, as a result of which the legal adviser would be “subject to professional discipline and ethics”.<sup>54</sup>

The CFI also dismissed the argument that the changes in the laws of some Member States since 1982 had resulted in a substantial change of the status of employed counsel for the purpose of LPP.<sup>55</sup> It noted that the protection of lawyer-client confidentiality was still withheld from in-house counsel in a number of jurisdictions<sup>56</sup> and that employed legal advisers were denied the possibility to join local “Bars” or “Law Societies” in several Member States.<sup>57</sup>

The Court was left unconvinced by the arguments, advanced by the applicants and by some of the interveners, that “the personal scope of the Community concept of confidentiality should be governed by national law.”<sup>58</sup> It took the different view that, since the protection of secrecy of lawyer-client correspondence “directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition”,<sup>59</sup> the application of conditions laid down by national law would jeopardise the effective exercise of the Commission’s enforcement powers in individual cases and would ultimately be incompatible with the supremacy of EC law.<sup>60</sup>

The CFI emphasised that the privilege constituted an exception to the extensive investigation powers enjoyed by the Commission and aimed at targeting the most serious infringements of the Treaty competition rules.<sup>61</sup> It stated that although the enactment of Regulation No 1/2003 had increased the importance of self-assessment of potentially anti-competitive commercial

---

<sup>53</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 167.

<sup>54</sup> *Id.*, para. 168.

<sup>55</sup> *Id.*, para. 173.

<sup>56</sup> *Id.*, para. 171.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Id.*, para. 176.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Id.*, para. 172.

practices and of “compliance programmes”, due to the abolition of the notification system, it had not affected the role of, respectively, in-house and independent counsel.<sup>62</sup>

The Court thus held that any such “exercise of self-assessment” could still be carried out by independent lawyers in constant liaison with the undertakings’ legal departments, just as was the case under Regulation No 17/62.<sup>63</sup> Accordingly, any communications exchanged between outside legal advisers and their in-house counterparts would be “in principle protected under LPP, provided that they are made for the purpose of the undertaking’s exercise of the rights of defence.”<sup>64</sup>

The judgment also examined the issues arising from the procedure followed by the Commission to assess whether evidence gathered in the course of its investigations could qualify for LPP. The CFI indicated that the decision determining whether the documents seized from the investigated parties should be protected by LPP constituted a “reviewable act” for the purpose of bringing an action under Article 230 EC Treaty.<sup>65</sup> It held that this decision brought to an end an *ad hoc* procedure aimed at examining the nature, whether privileged or otherwise, of the evidence in dispute<sup>66</sup> and consequently produced irreversible legal consequences for the undertakings’ rights of defence.<sup>67</sup>

The CFI recognised that once the Commission had struck down the investigated parties’ allegations that the document or documents are privileged, the consequences of the decision could not be made good by its later annulment.<sup>68</sup> Accordingly, it stated that the investigated undertakings should be entitled to lodge an appeal against the decision both when the latter had been adopted expressly and when the Commission had tacitly overridden the claim for LPP by seizing the document and placing it on the investigation file without taking a formal decision on its nature.<sup>69</sup>

The *AKZO Nobel* judgment also considered the issues arising from the practice of “casting a cursory glance” at the documents in dispute. The CFI held that an undertaking wishing to claim that evidence is covered by privilege,

---

<sup>62</sup> *Id.*, para. 173.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>65</sup> *Id.*, para. 45, 48.

<sup>66</sup> *Id.*, para. 46.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Id.*, para. 49.

despite not being obliged to disclose its contents,<sup>70</sup> would still be bound to produce sufficient and relevant material to support its claim.<sup>71</sup> As a result, if the Commission considered that the information adduced was not sufficient to ground a claim for privilege, it would be entitled to order the production of the actual documents and to cast a “cursory look” at them to establish whether they are privileged on the basis of external indicia such as the “layout, heading, title or other superficial features”.<sup>72</sup>

However, the Court recognised that there may be instances in which even casting a “cursory glance” on the evidence could irremediably prejudice the undertakings’ rights of the defence because the nature of the evidence may not be immediately apparent from the external characteristics of the documents.<sup>73</sup> In these cases, the Commission should place the documents in a sealed envelope with a view to it being reopened at a later stage for the purpose of resolving the matter.<sup>74</sup>

The CFI stated that, in any event, the Commission officials should not read the contested evidence until such time as the undertaking concerned has had the opportunity to challenge the decision and, if an action is brought, until the Court has handed down a judgment.<sup>75</sup> To hold otherwise would irremediably impair the right of the investigated undertakings to consult a lawyer without constraint, since the harm resulting from the disclosure of privileged documents could not be made good by challenging the final decision.<sup>76</sup> On this point, it was stated:

“Even if that document is not used as evidence in a decision imposing a penalty under the competition rules (...) [it] might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it.”<sup>77</sup>

---

<sup>70</sup> *Id.*, para. 79.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Id.*, para. 81.

<sup>73</sup> *Id.*, para. 83.

<sup>74</sup> *Id.*, para. 83.

<sup>75</sup> *Id.*, para. 88.

<sup>76</sup> *Id.*, para. 87.

<sup>77</sup> *Ibid.*

In the light of the above analysis, the *AKZO Nobel* judgment appears to disappoint somewhat the expectation that the CFI would take the opportunity to reformulate in a more generous manner the notion of LPP in Community law, since the Court refrained from replacing the “negative” concept of independence of the lawyer, which was at the basis of the *A.M. & S.* test, with a “positive” notion of that independence based on the allegiance to rules of conduct enforced in the public interest to ensure the proper functioning of the legal profession.<sup>78</sup>

However, although the Court declined to revise the existing requirements of privilege, the judgment remains very significant since it clarified the procedure which the Commission officials should adopt in respect of claims that evidence collected in the course of investigations are covered by LPP. It also stated that, whether it is taken expressly or tacitly, namely by annexing documents to the file without placing them in a sealed envelope, a decision resulting in privilege being denied constitutes an act open to challenge before the Luxembourg courts. The next section will therefore assess the impact of the *AKZO Nobel* judgment on the effective protection of the right to the confidentiality of lawyer-client communications in the context of competition investigations and attempt to investigate its implications for the role of the legal profession in Community law.

#### **4. Comment**

##### *4.1. The effectiveness of the rights of the defence in the light of ‘AKZO Nobel’: striking the “right balance”*

The previous section illustrated that the *AKZO Nobel* judgment, despite not bringing about the awaited reformulation of the existing set of requirements for LPP in Community law, made a number of important statements on the procedure that Commission officials should follow in determining whether evidence seized in the course of investigations was privileged and on the nature of the decision rejecting these claims to privilege.

Although the CFI confirmed that, in principle, it would be primarily for the Commission to carry out the assessment as to the nature of the documents, it also emphasised the duty of the investigating officers not to irremediably

---

<sup>78</sup> *Inter alia*, MYKOLAITIS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int’l J. of Trade & R.* 1 at 5-6.

impair the rights of defence of the interested parties in respect to the secrecy of potentially privileged evidence.<sup>79</sup>

Especially in cases in which the nature of a given document may not be immediately apparent from its external characteristics, it was indispensable to avoid the risk that even a “cursory glance” could jeopardise the fairness of the proceedings by enabling the Commission officials to seek additional evidence against the investigated parties at a later stage of the proceedings.<sup>80</sup>

As a result, the CFI, rather than running the risk of jeopardising the overall fairness of the procedure, preferred to adopt a “safer” position according to which, in case of conflict, the ultimate decision as to the nature of the disputed evidence should be left to the Court itself.<sup>81</sup> In other words, it could be argued that with the *AKZO Nobel* decision the Court suggested, rather pragmatically, that the investigating officials, once having cast a “cursory look” at allegedly privileged evidence, could not suffer from “acute amnesia” as regards its content if, at a later stage, that evidence was found to be covered by LPP. In case of dispute, the Commission officers should therefore resort to the practice of the “sealed envelope” and should refrain from reading the documents until the CFI has adopted a decision.<sup>82</sup>

The views adopted by the Court on this issue should be welcome since they emphasise the need to maintain adequate and effective “checks and balances” on the Commission investigations. In this respect, a parallel can be drawn with the case law of the European Court of Human Rights concerning the admissibility of evidence in criminal and civil cases. Given the limited purvey of this case note, it is not possible to survey the jurisprudence of the Strasbourg court concerning the protection of lawyer-client confidentiality.

Suffice to say that the European Court of Human Rights recognised in a number of judgments<sup>83</sup> that the protection against compulsory disclosure of communications exchanged between lawyer and client for the purpose of obtaining legal advice constitutes an essential aspect of the client’s right to a fair trial and, more generally, to a “fair hearing” in all legal proceedings

---

<sup>79</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 87.

<sup>80</sup> *Id.*, para. 88.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Id.*, para. 87-88.

<sup>83</sup> See, e.g., *Golder v United Kingdom*, Series 1, No 18, [1979-80] 1 EHRR 524; Appl. 12629/87, *S v Switzerland*, [1992] 14 EHRR 670; Appl. 13590/88, *Campbell v United Kingdom*, [1993] EHRR 137; Appl. 19380/92, *Bentham v United Kingdom*, [1996] 22 EHRR 293.

involving state authorities, including administrative bodies.<sup>84</sup> Protecting the secrecy of these exchanges is also necessary to encourage the “candour” of the client vis-à-vis his or her legal adviser<sup>85</sup> and to allow the provision of more reliable legal advice, in accordance with the “special status” enjoyed by the lawyer as an intermediary between the public and the courts in the interest of the sound administration of justice.<sup>86</sup>

On this specific point, it is noteworthy that the European Court of Human Rights preferred to adopt a more “functional” approach to the concept of the “professional independence” of the lawyer than the ECJ had done in *A.M. & S.*<sup>87</sup> Several of its decisions demonstrate that the existence or otherwise of a link of employment with his or her “client” would not be a decisive factor in the assessment of whether the legal adviser should be denied the protections afforded to him or her by the Convention.<sup>88</sup> The Strasbourg Court added that even lawyers not belonging to local “Bars” or “law Societies” could benefit from these safeguards, providing they are subject to a certain degree of control to “ensure professional integrity commensurate to [his or her] role and position.”<sup>89</sup>

In this respect, it must be observed that although “the monitoring and supervisory powers vested in Bar councils”<sup>90</sup> constitute perhaps the most important way in which this control can be exercised, the European Court of Human Rights recognised that other means could equally be capable of fulfilling that role, such as the “lawyer” being subject to the supervision of the trial court in a given case.<sup>91</sup> Although it is not possible to investigate in any more depth the case law of the Strasbourg Court, the above analysis appears to suggest that a closer adherence to the ECHR could justify the adoption of a

---

<sup>84</sup> *Inter alia*, *Golder v United Kingdom*, Series 1, No 18, [1979-80] 1 EHRR 524, para. 26, 36. For commentary, see e.g. GIPPINI FOURNIER, “Legal professional privilege in competition proceedings before the European Commission: beyond the cursory glance”, (2005) 28 *Fordham Int’l L J* 967.

<sup>85</sup> See, *inter alia*, WILLIAMS, “Four questions of privilege: the litigation aspect of legal professional privilege”, (1990) 9 (APR) *CJQ* 139 at 141.

<sup>86</sup> See, *inter alia*, Appl. No 23224/94, *Kopp v Switzerland*, [1999] 27 EHRR 91, para. 75; also, appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45. For commentary, see GIPPINI FOURNIER, cit. (footnote 79), p. 980.

<sup>87</sup> See, *mutatis mutandis*, JOSHUA, “Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?”, (2004) 7 *Global Comp. Rev.* 39

<sup>88</sup> Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 53-55; Appl. No 37328/97, *AB v Netherlands*, [2003] 37 EHRR 48, para. 86.

<sup>89</sup> Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45.

<sup>90</sup> Appl. No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1, para. 54.

<sup>91</sup> Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45.

“positive” notion of lawyers’ independence and, as a result, a more generous approach to the concept of LPP in Community law in the future.<sup>92</sup>

The European Court of Human Rights also recognised that, for the rights of defence of the investigated or accused parties to be effective, it was indispensable that the decisions adopted on these issues always be subject to the review of the judicial authorities.<sup>93</sup> It was held that when matters related to the disclosure of evidence had arisen, adequate procedures allowing a court of law to rule on the issue after hearing the interested parties should be in place to counterbalance any difficulty caused to the investigated or accused party by a limitation of his or her rights of defence.<sup>94</sup>

Against this background, it is argued that the emphasis placed by the CFI on the obligation imposed on the investigating officers to respect the secrecy of evidence whose nature remains controversial ensures that adequate procedural guarantees are in place to preserve the integrity of the undertakings’ rights of defence in the course of preliminary investigations and is therefore consistent with the Convention standards of “fair hearing”.<sup>95</sup>

The *AKZO Nobel* decision is also noteworthy for its statements on the nature of the decision rejecting a claim of privilege. It could be argued that the judgment demonstrates the willingness of the CFI to interpret rather generously the concept of “reviewable act” for the purpose of lodging an action for annulment under Article 230 EC Treaty. According to the *IBM* case, “only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position” may be challenged before the Community courts.<sup>96</sup>

However, prior to *AKZO Nobel*, the CFI and the ECJ had adopted a rather restrictive reading of the *IBM* test, as a result of which acts adopted in the course of preparatory proceedings, such as those adopted in the course of competition investigations, could not be challenged directly.<sup>97</sup> Any allegations

---

<sup>92</sup> See also MYKOLAITIS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int. T. L. R.* 1 at 6.

<sup>93</sup> Appl. 16424/90, *McMichael v United Kingdom*, Ser. A No 308, [1995] 20 EHRR 205, para. 80, 83, 91; appl. No 39482/98, *Dowsett v United Kingdom*, judgment of 24 June 2003, [2004] 38 EHRR 41, para. 42-43.

<sup>94</sup> See, *mutatis mutandis*, Appl. No 27052/95, *Jasper v United Kingdom*, [2000] 30 EHRR 441, para. 52; also, Appl. No 32559/96, *Fortum Corp v Finland*, judgment of 15 July 2003, [2004] 38 EHRR 36, para. 41 and 43.

<sup>95</sup> See, *inter alia*, appl. no 27052/95, *Jasper v United Kingdom*, [2000] 30 EHRR 441, para. 52.

<sup>96</sup> Case 60/81, *IBM v Commission*, [1981] ECR 2639, para. 9.

<sup>97</sup> See, e.g. cases T-10-12/92 & 15/92, *Cimenteries CBR SA and others v EC Commission*, [1992] ECR II -2667, para. 47; case T-90/96, *Automobiles Peugeot SA v Commission*, [1997] ECR II-663, para. 32,34,37.

that the Commission had acted improperly during its preliminary investigations could only be raised during the appeal against the final decision on the merits of the allegations of anticompetitive conduct,<sup>98</sup> unless the measure complained of had been adopted as a result of an “ad hoc procedure”, the outcome of which would be “independent of any final decision making a finding of an infringement of the competition rules”.<sup>99</sup>

On this point, *AKZO Nobel* seems to constitute something of a watershed. In its judgment the CFI recognised that, when the Commission rejected allegations that evidence seized during an inspection is covered by LPP and, as a result, annexed it to the file,<sup>100</sup> the current position would not afford the investigated undertakings “an adequate degree of protection” of their rights of defence.<sup>101</sup> The Court pointed out that the proceedings may not even be closed by a formal infringement decision on the merits of the individual case and, even if that occurred and that decision was later annulled, the judgment would not be sufficiently timely and effective to restore the consequences resulting from the earlier disclosure of evidence that had then turned out to be privileged.<sup>102</sup>

Accordingly, the CFI concluded that the decision rejecting a claim for privilege brought to an end a separate, “special procedure, distinct from that enabling the Commission to rule on an infringement of the competition rules”, and therefore constituted a “reviewable act”<sup>103</sup> open to judicial challenge. The Court also expressly acknowledged that the investigated parties could bring an action for annulment even when the decision had been adopted “tacitly”, i.e. when the Commission had seized a document whose nature was controversial and had placed it on the file without putting it into a sealed envelope.<sup>104</sup> In the Court’s view, “that physical act necessarily [entailed] a tacit decision by the Commission to reject the protection claimed by the undertaking (...) and [allowed it] to examine the document immediately.”<sup>105</sup>

---

<sup>98</sup> *Inter alia*, case T-214/01, *Oesterreichische Postsparkasse and others v Commission*, [2006] ECR II-1601, para. 65.

<sup>99</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 46; see, *inter alia*, case 53/85, *AKZO Chemie v Commission*, [1986] ECR 1965, para. 19-20.

<sup>100</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 46.

<sup>101</sup> *Id.*, para. 47.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Id.*, para. 48.

<sup>104</sup> *Id.*, para. 49.

<sup>105</sup> *Ibid.*



The above analysis illustrates that in *AKZO Nobel* the Court sought to strike an appropriate balance between the demands of the effective enforcement of the competition rules and the need to protect the rights of defence of the investigated parties.<sup>106</sup> The resulting circumstance that continuous judicial supervision must be in place over the Commission's assessment of the nature of the evidence appears consistent with the standards of "fair procedure" enshrined in Article 6(1) of the European Convention on Human Rights by ensuring that the rights of defence of the undertakings concerned are not irretrievably impaired in the course of the preliminary stages of the proceedings.

However, section 3 also demonstrated that, by reiterating the *A.M. & S.* requirements, the CFI disappointed expectations that the Community notion of LPP would be reformulated to allow its scope to expand as far as to cover communications emanating from employed counsel. The implications of the *AKZO Nobel* judgment for the concept of "independence" of legal advisers will be examined in the next section.

#### 4.2. *The "negative" independence of lawyers in EC law: what is its impact on the legal profession in Europe?*

Sections 2 and 3 discussed the implications of respectively, the interim order and the judgment in the *AKZO Nobel* case for the scope of LPP in Community law. It was argued that the 2004 order reflected the perception that the *A.M. & S.* test for privilege no longer appeared to reflect the status quo existing in the laws of several Member States which allowed employed counsel to become members of the local professional organisations and, thus, subjected them to the application of the relevant ethical standards, just as independent legal advisers.<sup>107</sup> Furthermore, several commentators pointed out that the enactment of the Modernisation Regulation had resulted in legal advisers, both "outside" and "in-house", becoming increasingly proactive in engaging in the

---

<sup>106</sup> See, *inter alia*, VESTERDORF, "Legal professional privilege and the privilege against self incrimination in EC law: recent developments and current issues", in HAWK (Ed.), *International Antitrust Law and Policy, Annual*, cit. (footnote 48), p. 701 at 730.

<sup>107</sup> E.g. England and Wales, Ireland, Holland and, subject to an undertaking of independence, Germany, Spain and Portugal; see CCBE, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland and certain other European Jurisdictions*—John FISH (February 2004), available at: [http://www.ccbe.org/en/comites/in\\_house\\_en.htm](http://www.ccbe.org/en/comites/in_house_en.htm), p. 25-27, 33, 38, 42-43, 48. Accessed on 12 March 2008.

self-assessment of *prima facie* anti-competitive practices,<sup>108</sup> and consequently called for greater protection of the secrecy of these communications.<sup>109</sup>

Other authors suggested that the introduction of extensive powers of cooperation between the Commission and the National Competition Authorities (hereinafter referred to also as NCAs) in the context of the European Competition Network (or ECN) could pose additional threats to the effective protection of the secrecy of lawyer-client communications.<sup>110</sup>

Vesterdorf observed extra-judicially that Regulation 1/2003 in substance allows information to be deployed against the investigated undertakings “even if it has been collected under rules which are less protective than those of the Commission or the receiving NCA”<sup>111</sup> subject only to the limits established by Article 12(3) for the protection of individuals.<sup>112</sup> Consequently, if the Commission were to transmit communications between an investigated undertaking and its in-house counsel to another jurisdiction, the competent NCA could deploy that evidence in the proceedings, regardless of the higher degree of protection afforded in its jurisdiction to lawyer-client confidentiality.<sup>113</sup>

The President of the CFI thus added, still extra-judicially, that recourse to Article 12(1), Regulation 1/2003, could prevent the concerned firms from claiming protection against forced disclosure of these communications not only vis-à-vis the Commission, but also vis-à-vis the receiving national competition authority in proceedings enforcing Articles 81 and 82 EC Treaty, since it would

---

<sup>108</sup> See, *inter alia*, FAULL, “In-house lawyers and legal professional privilege: a problem revisited”, (1998) 4 *Colum. J. of Eur. L.* 139 at 140; POWER, “Representing clients after the Modernisation of EC Competition law”, (2003) 14 *ICCLR* 335 at 336.

<sup>109</sup> See, e.g., FAULL, *loc. ult.cit.*

<sup>110</sup> See, *inter alia*, VESTERDORF, “Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues”, in HAWK (Ed.), *International Antitrust Law and Policy*, cit. (footnote 48), p. 701; also, ANDREANGELI, “The impact of the Modernisation Regulation on the guarantees of due process in competition proceedings”, (2006) 31(3) *ELRev* 342.

<sup>111</sup> VESTERDORF, “Legal Professional Privilege”, cit. (footnote 106), at 721.

<sup>112</sup> “Information exchanged pursuant to paragraph 1 can only be used in evidence to impose sanctions on natural persons where: - the law of the transmitting authority foresees sanctions of a similar kind in relation to an infringement of article 81 or article 82 of the Treaty or, in absence thereof, - the information has been collected in a way which respects the same level of protection of the rights of the defence of natural persons as provided for under the national rules of the receiving authority. However, in this case, the information exchanged cannot be used by the receiving authority to impose custodial sanctions” (Article 12(3), Council Regulation (EC) No 1/2003. See OFFICE of FAIR TRADING, *Powers of Investigation*, Draft competition law guidelines for consultation, April 2004, OFT 404a, para. 6.3.

<sup>113</sup> Also OFFICE of FAIR TRADING, *Powers of Investigation*, Draft competition law guidelines for consultation, April 2004, OFT 404a, para. 6.3.

result in their inability to benefit from more extensive standards of privilege available in the jurisdiction where that evidence is received.<sup>114</sup>

Against this background, the interim order was welcomed by some commentators as a realistic and reasoned response to the concerns emerging from both the developments in the laws of the Member States as regards the position of in-house counsel and the features of the “Modernised” framework for the enforcement of the Treaty competition rules.<sup>115</sup> Its reasoning seemed to support the view that the scope of professional privilege should be defined solely on the basis of the allegiance of the lawyer to binding rules of ethics.<sup>116</sup>

In the light of the 2004 order, it was thus suggested that a “positive” concept of independence, based on the commitment to the observance of ad hoc rules of ethics, should replace the “negative” notion of the lawyer’s autonomy, which was grounded, instead on the lack of a relationship of employment and, thus, of economic dependence between the legal adviser and his or her “client”.<sup>117</sup>

The final judgment, however, seemed to be something of a setback. The Court dismissed the allegations that there was a trend across the laws of some Member States in favour of recognising the protection of lawyer-client confidentiality to communications emanating from employed legal advisers. It preferred to take the view that, given the degree of variance still existing in the domestic laws within the EU, reaffirming the *A.M. & S.* requirements remained the most appropriate solution to the issue.<sup>118</sup>

The CFI pointed out that LPP constituted an exception to the extensive powers of investigation enjoyed by the Commission, an exception which, in the absence of significant changes in the role of legal advisers and especially of employed counsel, could not be interpreted widely.<sup>119</sup> In that respect, the Court held that although devising “self-compliance programmes” had become an

---

<sup>114</sup> VESTERDORF, “Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues”, in HAWK (Ed.), *International Antitrust Law and Policy*, cit. (footnote 48), p. 701 at 722.

<sup>115</sup> HILL, “A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community”, (1995) 27 *Case W. Res. J. of Int’l L.* 145; MURPHY, “CFI signals possible extension of professional privilege to in-house lawyers”, (2004) 25 *ECLR* 447; ANDREANGELI, “The protection of legal professional privilege in EU law and the impact of the rules on the exchange of information within the European Competition Network on the secrecy of communications between lawyer and client: one step forward, two steps back?”, (2005) 2(1) *CompLRev* 32.

<sup>116</sup> HILL, “A problem of privilege”, cit. (footnote 105), p. 191.

<sup>117</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 167-168.

<sup>118</sup> *Id.*, para. 167-168, 171.

<sup>119</sup> *Id.*, para. 172-173.

increasingly important task for the undertakings' legal advisers, it could equally be conducted by independent lawyers.<sup>120</sup> It was emphasised that, in this case, communications with the relevant legal departments, provided that they are made in the interest and for the purpose of the client's rights of defence, would be privileged, in accordance with *A.M. & S.*<sup>121</sup>

In the light of the above analysis, it is submitted that reasons of uniformity and legal certainty in the determination of what constituted "privileged" evidence for the purpose of Community law appear still to constitute the most powerful justification for the position of the CFI in *AKZO Nobel* and, thus, for retaining the 1982 concept of LPP.<sup>122</sup> On this point, a number of commentators had already noted how one of the advantages of the *A.M. & S.* test was that of being reasonably certain: by being based on a "negative" notion of independence, it gave unequivocal solutions to the question of whether evidence was privileged, even though the position adopted by the laws of the various Member States varied.<sup>123</sup>

It is noteworthy that the *AKZO Nobel* judgment rejected the argument that "the personal scope of the Community concept of confidentiality should be governed by national law"<sup>124</sup> and instead stated that, since the protection of secrecy of lawyer-client correspondence had a direct impact on the manner in which the Commission exercised its powers in a vital policy area for the common market, it was vital to ensure the uniform and effective application of the conditions governing these powers.<sup>125</sup>

Accordingly, it may be concluded that on a matter on which the national laws adopted different solutions and which could have considerable implications for the effective exercise of the Commission's enforcement powers, the CFI preferred to adopt a "lowest common denominator" for the definition of the requirements of LPP, for clear reasons of uniformity and legal

---

<sup>120</sup> *Id.*, para. 173.

<sup>121</sup> *Ibid.*

<sup>122</sup> See, e.g., JOSHUA, "Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?", (2004) 7 *Global Comp. Rev.* 39 at 42-43.

<sup>123</sup> See, e.g., *mutatis mutandis*, COHEN, "In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point", (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 317; also, ANDREANGELI, "The protection of legal professional privilege in EU law and the impact of the rules on the exchange of information within the European Competition Network on the secrecy of communications between lawyer and client: one step forward, two steps back?", (2005) 2(1) *CompLRev* 32 at 51.

<sup>124</sup> *Id.*, para. 176.

<sup>125</sup> *Ibid.*

certainty.<sup>126</sup> However, in striking a balance between the protection of the rights of defence of the investigated parties and the effective enforcement of the competition rules, the Court managed to “tilt the scales” in favour of the Commission and of the extensive use of its investigating powers.<sup>127</sup>

The next section will attempt to draw some conclusions on the implications of the *AKZO Nobel* judgment for the effectiveness of the rights of defence enjoyed by the investigated undertakings and will especially assess the extent to which LPP is adequately protected as a result of the decision adopted by the CFI to reaffirm the *A.M. & S.* test.

## 5. Conclusions

Overall, the analysis of the *AKZO Nobel* judgment has tried to illustrate the underlying tension between the need to ensure the effective enforcement of Articles 81 and 82 EC Treaty by the Commission and the protection of the rights of defence enjoyed by the investigated undertakings, of which LPP constitutes an essential component.<sup>128</sup> In this context, the requirements of legal certainty and of uniformity in the laws of the Member States play a key role in striking a balance between these two competing objectives and, therefore are decisive in achieving the solution to the question of where the boundaries of the privilege should lie.<sup>129</sup>

The CFI sought to achieve this balance by clarifying the extent of the procedural obligations incumbent on the Commission officials in the assessment of the nature, whether privileged or otherwise, of the documents seized in the course of the competition investigations. In addition, by stating that the decision rejecting, either expressly or tacitly, the claims that this evidence is covered by LPP and, accordingly, should not be annexed to the file, constitutes a reviewable act for the purpose of an action for annulment ex Article 230 EC Treaty, the Court subjected the Commission's measures

---

<sup>126</sup> *Inter alia*, MYKOLAITS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int. T. L. R.* 1 at 5-6.

<sup>127</sup> See especially para. 176-177 of the judgment. See, *inter alia*, ANDREANGELI, “The impact of the Modernisation regulation on the guarantees of due process in competition proceedings”, (2006) 31 (3) *ELRev* 342 at 350-352.

<sup>128</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 47-48, 121, 167-168.

<sup>129</sup> *Id.*, para. 172, 173.

impinging upon essential elements of the undertakings' rights of defence to direct judicial supervision.<sup>130</sup>

Although it is acknowledged that the recourse to the "sealed envelope" procedure could delay the administrative proceedings and result in the Commission becoming the target of litigation in the CFI even before it is actually able to rely on the evidence,<sup>131</sup> it is submitted that any other solution would unduly hamper the rights of defence of the investigated parties, especially when the nature of the documents in question is not immediately apparent from their external features.

In addition, the recognition that, in principle, "preparatory internal documents", namely documents drafted by employed legal advisers for the purpose of providing an independent lawyer with the necessary information with a view to supplying legal advice, would benefit from the privilege<sup>132</sup> confirms the importance of LPP as an essential component of the undertaking's rights of defence and an indispensable guarantee of "fair procedure" before the Commission.<sup>133</sup> Overall, in the light of the brief comparative analysis of the standards of protection of LPP enshrined in the ECHR,<sup>134</sup> it is argued that the CFI's remarks on this point should be welcomed as an attempt to reconcile the very essence of the privilege as a means for every person to be "able without constraint, to consult a lawyer" in the interest of the sound administration of justice<sup>135</sup> with the effective enforcement of the Treaty competition rules.<sup>136</sup>

However, the judgment did not bring about the much awaited reformulation of the *A.M. & S.* test for LPP. It has been argued that the CFI decision "perpetuates a discrepancy between the protection afforded by privilege to in-house lawyers under the laws of some Member States, including

---

<sup>130</sup> See, *mutatis mutandis*, appl. No 39482/98, *Dowsett v United Kingdom*, judgment of 24 June 2003, [2004] 38 EHRR 41, para. 42-43; also appl. no 27052/95, *Jasper v United Kingdom*, [2000] 30 EHRR 441, para. 52.

<sup>131</sup> MYKOLAITIS, "Developments of legal professional privilege under *AKZO/Ackros* judgment", (2008) 14(1) *Int. T. L. R.* 1 at 4.

<sup>132</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 122-124.

<sup>133</sup> See also, *mutatis mutandis*, case T-30/89, *Hilti AG v Commission* (interim order), [1990] ECR II-163, para. 17-18. For commentary, MYKOLAITIS, loc. ult. cit., p. 5.

<sup>134</sup> *Supra*, section 4.1. See, *inter alia*, Appl. 19380/92, *Bentham v United Kingdom*, [1996] 22 EHRR 293; Appl. No 39482/98, *Dowsett v United Kingdom*, judgment of 24 June 2003, [2004] 38 EHRR 41.

<sup>135</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 121.

<sup>136</sup> See also, *mutatis mutandis*, case T-30/89, *Hilti AG v Commission* (interim order), [1990] ECR II-163, para. 17-18.

the United Kingdom, and EU law”.<sup>137</sup> It was added that *AKZO Nobel* maintains the difference of treatment between the communications emanating from counsel employed by investigated parties and those lawyers belonging to the EC Legal Service, which are similarly protected against disclosure.<sup>138</sup>

It could be argued that the CFI rejected the arguments in favour of a “positive” meaning of “professional independence” based on the lawyer’s allegiance to rules of ethics<sup>139</sup> because it was concerned that this conclusion would result in subordinating the Community notion of privilege to the fulfilment of requirements dictated by national law.<sup>140</sup>

On this point, it has been suggested that the Court’s fears may have been partly unjustified since the judgment could either have established “autonomous criteria in the field of in-house LPP” or could have declared that the lawyer in the case at hand satisfied the requirements of “independence”.<sup>141</sup> Also, although it is undeniable that the CFI chose perhaps an “easy way out”, based on a “tried-and-tested” formula of LPP,<sup>142</sup> its position could perhaps be explained in relation to the circumstance that in-house counsel is still allowed membership of local “Bars” or “Law Societies” only in a relatively small number of Member States. As a result, it may be suggested that the consensus on whether employed legal advisers should be allowed membership to professional bodies would not be sufficient to justify a change in the concept of “lawyer’s independence” for the purpose of determining LPP.<sup>143</sup>

Seen in this light, it could be argued that the outcome of the case was perhaps the most desirable since it ensured continuity with the case law of the

---

<sup>137</sup> Case Comment, “Legal professional privilege: European Union”, (2008) 12 (1) *Int’l J. of Ev. & Proof* 72 at 74.

<sup>138</sup> *Ibid.* See, *inter alia*, case T-92/98, *Interporc v Commission*, [1999] ECR II-3521, para. 40-41.

<sup>139</sup> Joined cases T-125/03 and 253/03, *AKZO Nobel Ltd and Ackros Chemicals Ltd v Commission*, judgment of 17 September 2007, not yet reported, para. 168.

<sup>140</sup> *Id.*, para. 171.

<sup>141</sup> MYKOLAITIS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int. T. L. R.* 1 at 5.

<sup>142</sup> *Ibid.* See also, *mutatis mutandis*, COHEN, “In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point”, (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 317; also, ANDREANGELI, “The protection of legal professional privilege in EU law and the impact of the rules on the exchange of information within the European Competition Network on the secrecy of communications between lawyer and client: one step forward, two steps back?”, (2005) 2(1) *CompLRev* 32 at 51.

<sup>143</sup> Case Comment, “Legal professional privilege: European Union”, (2008) 12 (1) *Int’l J. of Ev. & Proof* 72 at 73. See also CCBE, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland and certain other European Jurisdictions*—John FISH (February 2004), available at: [http://www.ccbe.org/en/comites/in\\_house\\_en.htm](http://www.ccbe.org/en/comites/in_house_en.htm), p. 25-27, 33, 38, 42-43, 48. Accessed on 12 March 2008.

ECJ and legal certainty for both the Commission and the investigated parties as regards the outcome of claims that evidence should be privileged.<sup>144</sup>

However, if examined against the backdrop of the principles enshrined in the ECHR, concerning the function of lawyers in a democratic society and their “special status” of intermediaries between the public and the courts, which arguably justifies the protection of LPP itself,<sup>145</sup> the CFI’s views do not sound completely convincing. As section 4.1 illustrated, the European Court of Human Rights has recognised in a number of judgments that the existence of a link of employment with his or her client may not be a decisive factor in denying a lawyer the safeguards provided to him or her by the ECHR, if in addition the legal adviser was subject to a certain degree of control to ensure his or her professional integrity.<sup>146</sup>

The case law of the Strasbourg Court also indicated that, although the monitoring powers of “Bar Councils” are perhaps the most common form of oversight,<sup>147</sup> other means, such as the supervision exercised on the lawyer by the trial court in a particular case, could be equally effective in fulfilling that function.<sup>148</sup> Accordingly, it was suggested that an increased degree of consistency with the ECHR could justify the future adoption of a “positive” notion of lawyer’s independence and consequently the emergence of a more generous approach to LPP.<sup>149</sup>

In the light of these considerations, it is clear that the appeal judgment of the ECJ<sup>150</sup> is widely awaited since it will determine the question of whether LPP should be extended to the communications emanating from employed counsel and will answer the overarching question of which procedural guarantees should be in place to reconcile the apparently conflicting interests of the effective application of the EC competition rules and the meaningful protection of the rights of defence of the investigated parties. Overall, it is expected that

---

<sup>144</sup> MYKOLAITIS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int. T. L. R.* 1 at 5-6.

<sup>145</sup> See, *inter alia*, Appl. No 23224/94, *Kopp v Switzerland*, [1999] 27 EHRR 91, para. 75; also, Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45. For commentary, see GIPPINI FOURNIER, *cit.* (footnote 79), p. 980.

<sup>146</sup> *Inter alia*, appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45, 53-55.

<sup>147</sup> Appl. No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1, para. 54.

<sup>148</sup> Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45, para. 45.

<sup>149</sup> See also MYKOLAITIS, “Developments of legal professional privilege under *AKZO/Ackros* judgment”, (2008) 14(1) *Int. T. L. R.* 1 at 6.

<sup>150</sup> Case 550/07 P: Appeal brought on 8 December 2007 by AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd against the judgment of the Court of First Instance (First Chamber) delivered on 17 September 2007 in Case T-253/03: *Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd v the Commission of the European Communities*, [2008] OJ C37/19.



the ECJ decision will have a wider impact on the definition of the role of lawyers and of the notion of their “professional independence” in EC law for the purpose of the provision of independent and sound legal advice and in the interest of the efficient and fair administration of justice.